3-30-2009

State v. Pierce Appellant's Brief Dckt. 35063

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. LUIS JAMES PIERCE, Defendant-Appellant.	)	NO. 35063 APPELLANT'S BRIEF

BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FOURTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

HONORABLE MICHAEL E. WETHERELL
District Judge

MOLLY J. HUSKEY
State Appellate Public Defender
State of Idaho
I.S.B. # 4843

SARA B. THOMAS
Chief, Appellate Unit
I.S.B. # 5867

JASON C. PINTLER
Deputy State Appellate Public Defender
I.S.B. # 6661
3647 Lake Harbor Lane
Boise, Idaho 83703
(208) 334-2712

ATTORNEYS FOR
DEFENDANT-APPELLANT

KENNETH K. JORGENSEN
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-4534

ATTORNEY FOR
PLAINTIFF-RESPONDENT

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STATEMENT OF THE CASE

Nature of the Case

This case presents an issue of first impression for this Court's consideration. Article I, § 8 of the Idaho Constitution allows for felony prosecutions to begin only upon either the filing of Information of the prosecutor or Indictment of a grand jury; however, if a grand jury has "ignored" a charge, a defendant may not be held to answer upon an Information of the prosecutor. The record in this case indicates that the State filed a criminal complaint alleging that Mr. Pierce had committed the crime of sexual abuse of a child under sixteen and, after a preliminary hearing, an Information was filed charging Mr. Pierce with this crime. Mr. Pierce pled guilty and, during the sentencing hearing, the prosecutor stated that a grand jury proceeding had been held in this case. Mr. Pierce, through motions filed with this Court during the appellate process, sought additional evidence of the grand jury proceedings in this case and whether the grand jury ignored the charge. The record now shows that three grand jury proceedings occurred during the approximate time period that Mr. Pierce's case would have been presented, but this Court has denied Mr. Pierce the ability to discover whether any of those proceedings involved his case.

Based upon the admission of the prosecutor that a grand jury reviewed Mr. Pierce's case, an admission that has not been disproved by the record, and based upon the fact that no Indictment was issued, Mr. Pierce asserts that his right to be free from prosecution upon Information of the prosecutor, after a grand jury ignored the charge, was violated. He further asserts, as an issue of first impression, that the plain

language of Article I, § 8 in effect limits when a court has subject-matter jurisdiction and that a violation of this Constitutional provision can be raised for the first time on appeal. Because the district court lacked jurisdiction, Mr. Pierce's conviction must be vacated. Alternatively, Mr. Pierce asserts that the district court abused its discretion by revoking his probation or by failing to reduce his sentence, upon his admission to probation violations

Statement of the Facts and Course of Proceedings – Trial Court

Based upon an allegation that on March 6, 2006, he had pulled down the underwear of a four-year-old girl, Louis Pierce was arrested. (Presentence Investigation Report, (*hereinafter* PSI), 9/14/06, p.2.) The next day, the State filed a Complaint in Ada County case number M0603051 alleging that Mr. Pierce had committed the crime of sexual abuse of a child under the age of sixteen years, by having "sexual contact" with four year old M.B. by pulling down her underwear, so that he could see her genitals. (Augment: Complaint (M06003051).)[1] Mr. Pierce was arraigned on the charges and a preliminary hearing was set. (Augment: Ada County Magistrate Minutes, March 7, 2006 (M06003051).) However, on March 20, 2006, the date set for hearing, the prosecuting attorney, Jean Fisher, moved to dismiss the allegation – a motion granted by the magistrate. (Augment: Ada County Magistrate Minutes, March 20, 2006; Order of Release (M06003051).)

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[1] Mr. Pierce has filed a Motion to Reconsider Denial of Motion to Augment the Record and Statement in Support Thereof asking this Court to reconsider the portion of a previous ruling in which this Court denied Mr. Pierce's request to augment the record with documents from Ada County case number M0603051. The motion to reconsider is

The next day, the State filed a Complaint in Ada County case number M0603728, again alleging that Mr. Pierce had committed the crime of Sexual Abuse of a Minor on March 6, 2006, naming M. B. as the alleged victim. (R., pp.7-8.) The charging language contained in this Complaint is nearly identical to the language contained the Complaint filed in M0603051 with the exception that the second Complaint contains an added allegation that Mr. Pierce was over the age of eighteen when the alleged crime occurred. (*Compare* Augment: Complaint (M0603051) *with* R., pp.7-8.) Shelley Armstrong represented the prosecuting attorney's office during the Preliminary Hearing in this case. (Exhibit: Tr., prelim.) The only exhibit offered during the preliminary hearing was a written statement created by Mr. Pierce on the night of his arrest. (Exhibit: Tr., prelim, p.13, L.11 – p.15, L.15.) Mr. Pierce was bound over to the district court, and an Information was filed charging him with the above crime. (R., pp.13-21; Exhibit: Tr., prelim.)

Mr. Pierce, without the benefit of a plea bargain, pled guilty as charged. (Tr., 8/1/06, p.1, L.1 – p.16, L.21.) Again, Ms. Armstrong represented the prosecuting attorney's office during the entry of plea hearing. (R., p.41; Tr., 8/1/06, p.1, L.1 – p.16, L.21.) On October 25, 2006, a sentencing hearing was held wherein Jean Fisher represented the State. (R., pp.47-50; Tr., 10/25/06, p.17, L.1 – p.48, L.20.) The district court began the sentencing hearing by identifying the case, the parties, the purpose of the hearing, and identified the materials to be included with the PSI. (Tr., 10/25/06, p.17, L.1 – p.18, L.16.) The Court asked Ms. Fisher if she had adequate time to review the materials and Ms. Fisher responded by stating, "I have, Your Honor. And what was not included in those that I saw in Ms. Armstrong's file are two photographs of the

children in question. I would like to include those for purposes of the pre-sentence investigation. **These were shown to the grand jury as well.**" (Tr., 10/25/06, p.18, Ls.14-23 (emphasis added).)

Ultimately, the district court sentenced Mr. Pierce to a unified term of fifteen years, with five years fixed, but retained jurisdiction in order for Mr. Pierce to participate in the rider program. (R., pp.51-54.) Mr. Pierce successfully completed his rider and was placed on probation for a period of fourteen years. (R., pp.58-71.) About seven months later, the State filed a motion for probation violation. (R., pp.78-81.) Mr. Pierce admitted to violating his probation by failing to pay his supervision fees, failing to complete sex offender treatment and by frequenting places where minors or victims of choice congregate. (Tr., 12/13/07, p.10, L.21 – p.11, L.20.) The district court revoked Mr. Pierce's probation and executed his underlying sentence. (R., pp.89-91.) Mr. Pierce filed a timely Notice of Appeal from the Order of Revocation of Probation, Imposition of Sentence and Commitment. (R., pp.92-94.)

Statement of the Facts and Course of Proceedings – Appellate Court

Mr. Pierce filed a motion with this Court asking the Court to augment the record with any transcript of grand jury proceedings, if they exist, concerning the allegation that Mr. Pierce sexually abused M.B. on March 6, 2006, which would likely have been held sometime between March 7 and March 20, 2006. (*See* Motion to Augment and to Suspend the Briefing Schedule Pending Revelation of Grand Jury Determination and Statement in Support Thereof, filed October 14, 2006.) In the same motion, Mr. Pierce requested that this Court augment the record with any document, if one exists, indicating that the grand jury declined to issue an Indictment against Mr. Pierce for his

alleged abuse of M.B. on March 6, 2006. *Id.* Alternatively, Mr. Pierce requested that if no grand jury proceedings occurred, that this Court order the district court to enter a written statement indicating such. *Id.*

In response, this Court entered an Order requiring that "the District Court Clerk shall SEARCH THEIR RECORDS AND REPORT WHETHER ANY GRAND JURY PROCEEDING WAS INITIATED as to Defendant Luis James Pierce and report existence or non-existence of the same" to the parties and the Court. (*See* Order Re: Motion to Augment and to Suspend the Briefing Schedule Pending Grand Jury Determination, dated December 8, 2008.) In response to this Court's order the district court filed, with this Court a written statement indicating the following:

> The staff of the clerk's office was unable to locate any records regarding grand jury proceedings involving the Defendant-Appellant nor any information that such proceedings took place. **The staff's search indicated that records of three grand jury proceedings (Nos. 22, 23 and 24), which may have taken place during the approximate time frame, were not received by the clerk's office.** The clerk's staff was unable to find any grand jury minutes, voting records, or other documents showing that a grand jury declined to issue an indictment against the Defendant-Appellant.

(*See* Response of the District Court Clerk to Order Re: Motion to Augment and to Suspend the Briefing Schedule Pending Grand Jury Determination, dated December 12, 2008 (emphasis added)).

Thereafter, Mr. Pierce filed a second motion to augment in essence requesting three things. (*See* Motion To Augment And To Suspend The Briefing Schedule And For *In Camera* Review Of Grand Jury Proceedings And Statement And Affidavit In Support Thereof, filed January 16, 2009.) First, Mr. Pierce requested that this Court augment the record with documents filed in Ada County case number M0603051, the docket

number wherein the prosecutor originally filed, then dismissed the allegation of sexual abuse against Mr. Pierce, and included copies of the documents with the motion. *Id.* Second, Mr. Pierce requested that this Court order the creation of a transcript of the March 20, 2006, scheduled preliminary hearing in Mr. Pierce's case wherein the court minutes reflect the State dismissed the charge, but the minutes did not indicate a reason for the dismissal or whether it was with prejudice. *Id.*

The third request Mr. Pierce made was that this Court order the Honorable Darla S. Williamson, Administrative Judge for the Ada County District Court, or her designee, to conduct an *in camera* review of all of the recordings occurring in grand jury proceedings Nos. 22, 23, 24, as indicated in the clerk's response to this Court's Order requiring the district court to review its file to see if any grand jury proceedings occurred in Mr. Pierce's case and to inform the parties to this appeal whether such a proceeding had occurred. *Id.* Mr. Pierce alternatively requested that if it was impossible for Judge Williamson to review these proceedings that she provide a written statement indicating the reason. *Id.* This alternative request was made because, as is indicated in the affidavit of counsel attached to the motion, two district court personnel had stated, respectively, that when a grand jury does not issue an indictment, no records are kept by the district court, and that the Ada County prosecutor handling the proceedings deletes the recordings of the proceedings.[2] *Id.* In response, the Court issued an order simply denying Mr. Pierce's motion without providing any reason for doing so. (*See*

[2] Mr. Pierce understands that counsel's affidavit attached to the Motion to Augment and to Suspend the Briefing Schedule and for *In Camera* Review of Grand Jury Proceedings and Statement and Affidavit in Support Thereof, is not evidence on this appeal. However, this information is relevant to consider the question of whether or not

Order Denying Motion to Augment and to Reset the Briefing Schedule, dated February 17, 2009.)[3] This Appellant's Brief follows.

ISSUES

1 Has Mr. Pierce's right to be free from trial by Information after a grand jury has ignored a charge, protected by Article I § 8 of the Idaho Constitution, been violated requiring that his conviction be vacated as the district court did not have subject-matter jurisdiction over the alleged crime?

2. Did the district court abuse its discretion after Mr. Pierce admitted to violating his probation by executing his original sentence under the facts and circumstances of this case?

ARGUMENT

I.

Mr. Pierce's Right To Be Free From Trial By Information After A Grand Jury Has Ignored A Charge, Protected By Article I § 8 Of The Idaho Constitution, Has Been Violated Requiring That His Conviction Be Vacated As The District Court Did Not Have Subject-Matter Jurisdiction Over The Alleged Crime

A. Introduction

Article I, § 8 of the Idaho Constitution clearly and unequivocally states that if a grand jury ignores a charge against a person, that person cannot be thereafter charged for the same offense by Information. While no Idaho Court has so held, the clear and unequivocal language of this Constitutional provision denies a court subject-matter jurisdiction, normally conferred through a properly filed Information, when that Information is filed upon a charge previously ignored by a grand jury. Based upon the State's admission that a grand jury heard Mr. Pierce's case, and based upon the fact that the grand jury did not Indict Mr. Pierce, he asserts that the Information filed by the State did not confer subject-matter jurisdiction to the Court and as such, his conviction stemming from that Information must be vacated.

B. Article I, § 8 Of The Idaho Constitution Both Grants And Limits A District Court's Subject-Matter Jurisdiction. A Court Has No Subject-Matter Jurisdiction Over A Case Where An Information Is Filed In Violation Of This Provision And The Issue Can Be Raised For The First Time On Appeal

As will be argued more fully in section I(C) below, Mr. Pierce asserts that the record in this case reveals that a grand jury heard his case and ignored the charge against him despite the fact that there is no official document in the record indicating as such. In order to determine the relevance of this factual determination, this Court must

first decide an issue of first impression – whether an Information filed after a grand jury has ignored a charge, in violation of Article I, § 8 of the Idaho Constitution, is a legal nullity and, thus, fails to confer subject-matter jurisdiction to a court. Mr. Pierce asserts that an Information filed in such a manner is a legal nullity, the district court had no subject-matter jurisdiction to hear his case, and the issue can be raised for the first time on appeal.

1. The Rights Enumerated In Article I, § 8 Are Both Individual Rights And A Limitation On State Power

The right to be free from prosecution other than by Indictment of Information enumerated in Article I, § 8 is not merely a limit on the State's power to prosecute – it is also a right held by individuals. Article I of the Idaho Constitution is entitled "Declaration of Rights." IDAHO CONST. art. I. Generally, the subsections of this article enumerate rights retained by individuals against State power. Article I, § 1 states that "All men are by nature free and equal, and have certain inalienable rights, among which are enjoying and defending life and liberty; acquiring, possessing and protecting property; pursuing happiness and securing safety." IDAHO CONST. art. I, § 1. The ideals articulated in this section echo ideals articulated during the founding of this nation.

Article I, § 8 reads, in relevant part, as follows:

> No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate ... and provided further, that after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefore, upon information of the public prosecutor.

IDAHO CONST. art. I, § 8. By its plain language, this section reserves the right of individuals to be held to answer for felony offenses – offenses which if proven would

allow the State to deprive individuals of their rights to life, liberty and property – only after a grand jury has issued an indictment (or presentment), or after a prosecutor has filed an information upon a magistrate's commitment. *Id.* In other words, individuals cannot be held to answer for a felony offense unless a grand jury has issued an indictment or a prosecutor has filed an information. *Id.*

This individual right to be free from prosecution except by Information, is extended beyond the sole requirement of a commitment by a magistrate in situations where a grand jury has ignored a charge. *Id.* In such a case, an individual may not be held upon Information at all. *Id.* As a corollary, a prosecutor may not prosecute an individual on an Information after a grand jury has ignored the charge. In other words, individuals cannot be held to answer for a felony offense alleged in an Information unless no prior grand jury has reviewed and ignored the charge.

2. An Indictment Or Information Confers Subject-Matter Jurisdiction To The District Court

A criminal proceeding cannot be held against a defendant in a trial court unless that court has both personal and subject-matter jurisdiction over the defendant. *State v. Rogers*, 140 Idaho 223, 227-28, 91 P.3d 1127, 1131-32 (2004). A trial court attains personal jurisdiction over a defendant – meaning the court's ability to hold the particular defendant to answer – when that defendant initially appears in court on a criminal complaint or an arraignment after an Indictment as been issued. *Id.* (citations omitted.)

Subject-matter jurisdiction describes a court's power to hear and determine a particular case. *Id.* (citations omitted). In a felony criminal context, the trial court's subject-matter jurisdiction is conferred to the district court through the charging

document, i.e., an Indictment or Information. *Id.* (citations omitted); *see also State v. Jones*, 140 Idaho 755, 101 P.3d 699 (2004); *State v. Quintero*, 141 Idaho 619, 115 P.3d 710 (2005). Absent a properly filed Indictment or Information, a district court does not have subject-matter jurisdiction to hear the case.

3. Although An Indictment Or Information May Be Filed, A Court's Subject-Matter Jurisdiction, Ostensibly Conferred By The Filing Of The Document, May Be Illusory

Idaho Criminal Rule 7 articulates the requirements of Indictments and Informations. I.C.R. 7. Occasionally, an Indictment or Information will contain defects. However, not all defects that may be contained in these charging documents deprive a district court of subject-matter jurisdiction. Idaho Criminal Rule 12(b) requires that challenges to defects in the charging document, "other than it fails to show jurisdiction of the court or to charge an offense," must be raised prior to trial. I.C.R. 12(b). Although a document may be filed which is entitled "Indictment" or "Information," it may not actually confer subject-matter jurisdiction to the district court.

a. Subject-Matter Jurisdiction Can Never Be Waived And An Appellate Court Can Review Whether A Charging Document Properly Conferred Subject-Matter Jurisdiction For The First Time On Appeal

The Idaho Supreme Court recognizes that while personal jurisdiction may be either waived or submitted to by an individual's voluntary appearance in court, subject-matter jurisdiction cannot be waived. *Rogers*, 140 Idaho at 227-28, 91 P.3d at 1127-28 (citations omitted). As such, even if a defendant in a criminal case does not challenge the district court's subject-matter jurisdiction in the district court, an appellate court

nevertheless may determine whether subject-matter jurisdiction exists when the question is raised for the first time on appeal. *Id.*

b. Although An Information Contains A Statement Of Territorial Jurisdiction And The Applicable Code Section Is Cited, An Information Filed After A Grand Jury Ignores A Charge Does Not Confer Subject-Matter Jurisdiction Upon A Court

In recent years, the Idaho Supreme Court has addressed challenges to the charging document raised for the first time on appeal. In *Jones*, the Idaho Supreme Court recognized that two challenges to a charging instrument can be raised: first, whether the charging instrument complies with due process requirements, a challenge that must be made during trial court proceedings; and, second, "whether an indictment or information is legally sufficient for the purpose of imparting jurisdiction." *Jones*, 140 Idaho at 758, 101 P.3d at 702. In *Quintero*, decided the following year, the Court held that when a charging document is challenged after the entry of judgment, the charging document will be deemed to have conferred subject-matter jurisdiction upon the court as long as it contains a statement of territorial jurisdiction and contains citation to the applicable code section. *State v. Quintero*, 141 Idaho 619, 622, 115 P.3d 710, 713 (2005) (citing *Jones*, 140 Idaho at 759, 101 P.3d at 703; I.C.R. 12(b). However, both *Jones* and *Quintero* dealt with a challenge to the sufficiency of the charging instrument where the charging instrument omitted elements of the crime charged. *See State v. Quintero*, 141 Idaho 619, 115 P.3d 710 (2005), *generally*; *see also State v. Jones*, 140 Idaho 755, 101 P.3d 699 (2004), *generally*. Mr. Pierce is unaware of any case wherein an Idaho Supreme Court, in its majority opinion, has held that filing an Information after a grand jury has ignored the charge, in violation of Article I, § 8, also deprives a court of

subject-matter jurisdiction. However, the plain reading of the constitutional provision as well as other precedent from Idaho leads inevitably to the conclusion that such a violation does deprive a court of subject-matter jurisdiction.

> As noted above, Article I, § 8 reads:
>
> > No person shall be held to answer for any felony or criminal offense of any grade, unless on presentment or indictment of a grand jury or on information of the public prosecutor, after a commitment by a magistrate ... and provided further, that **after a charge has been ignored by a grand jury, no person shall be held to answer, or for trial therefore, upon information of the public prosecutor**.

Idaho Const. Art. I, § 8 (emphasis added). The language is plain, concise, and unambiguous. "No" means "no" and, because the Indictment or Information confers subject-matter jurisdiction upon the Court, an Information filed in violation of Article I, § 8's prohibition against filing an Information after a grand jury has ignored a charge, is a nullity.

In *Ex Parte Winn*, 28 Idaho 461, 154 P. 497, 498 (1916), the petitioner filed a *writ of habeas corpus* arguing that Article I, § 8 of the Idaho Constitution prevented the petitioner from being tried upon an Information filed in that case when a grand jury had ignored the charge. *Id.* However, in that case, the grand jury met *after* the defendant was charged by Information with the crime. *Id.* The Court noted, "A fatal defect in this contention arises from the fact that, conceding the grand jury did ignore the charge, petitioner had been theretofore, instead of thereafter, held to answer and for trial." *Id.* Because the defendant had waived his right to a preliminary hearing and was held to answer in the district court, "the court acquired jurisdiction of petitioner and of the offense with which he was charged from which it could not be deprived by any action of a grand jury convened at a subsequent term." *Id.* While the Court did not address what

its ruling would have been had the grand jury ignored the charge "theretofore" the Information was filed, the Court recognized that jurisdiction was properly conferred to the district court because the Information was not improperly filed.

In *State v. Wilson*, 41 Idaho 598, 242 P. 787 (1925), the defendant appealed the district court's denial of his motion to quash and the exclusion of testimony from the prosecutor and the foreman of the grand jury, which he asserted would have shown that he was "acquitted" of the charge he was facing when the grand jury ignored the charge. *Id.* 41 Idaho at __, 242 P.2d at 787-88. The Idaho Supreme Court held that the denial of the defendant's motion to quash was not incorporated into a special bill of exceptions and thus was not properly before the Court. *Id.* The Court then held that his special plea, a statement that he had been "acquitted" of the charge after the grand jury ignored the charge, was not properly made and, even if this were not so, the district court did not err in excluding the proffered testimony because the failure of a grand jury to indict was not an "acquittal" under a double jeopardy analysis. *Id.*

During the trial the appellant called the former prosecuting attorney and foreman of the grand jury, they were not allowed to testify, and the appellant made an offer of proof that, if allowed, they would testify that the grand jury previously ignored the charge against him. *Id.* 41 Idaho at __, 242 P. at 789. The Court recognized that "Counsel vigorously contends, however, that his offer raised a jurisdictional question of the highest order." *Id.* However, the Court found that the evidence proffered was intended to support a finding that his prosecution should be barred by operation of Article I, § 8, a determination beyond the province of the jury. *Id.*

Chief Justice Lee authored an opinion concurring in part and dissenting in part.[4] *Id.* 141 Idaho at ___, 242 P. at 790-92 (C.J. Lee, concurring and dissenting.) Chief Justice Lee dissented because he believed that the "record on this appeal presents this jurisdictional question and this court should decide it." *Id.* 41 Idaho at ___, 242 P. at 790 (C.J. Lee, concurring and dissenting.) Chief Justice Lee cited to Article I, § 8 of the Idaho Constitution and continued:

> There can be no question but what this constitutional provision intends to bar and absolutely prohibit the public prosecutor from prosecuting one accused of crime after the charge has been ignored by a grand jury. With the wisdom of this organic act we are not concerned.

Id. Chief Justice Lee found, "If an information could not be filed, the alleged information presented *no question* to the trial court that called its powers into action, except to require it to deny jurisdiction and dismiss the proceedings." *Id.* 41 Idaho at ___, 242 P. at 791 (C.J. Lee, concurring and dissenting.). He concluded:

> In the case at bar, the defendant was tried upon an information that is a nullity, because neither the public prosecutor or any one else had the power to make the charge, and hence no charge was made, and the verdict of guilty and the judgment of conviction thereon are void.

Id. 41 Idaho at ___, 242 P. at 792 (C.J. Lee, concurring and dissenting.)

Thus, while Idaho Court's have yet to specifically rule that an Information filed after a grand jury has ignored a charge is a nullity and does not confer subject-matter jurisdiction to the Court, the plain reading of the Constitutional provision and the authorities cited above should lead this Court to hold as such.

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[4] Due to the death of Chief Justice Dunn prior to the case being fully briefed and decided, Justice Lee authored both a portion of the majority opinion and a separate

4. Because Mr. Pierce Claims That The District Court Lacked Subject-Matter Jurisdiction To Hear His Case Based Upon The Information Filed After The Grand Jury Ignored His Case, His Claim Is Ripe For Appellate Review

As noted above, a question of subject matter can be reviewed for the first time on appeal. *State v. Jones*, 140 Idaho 755, 101 P.3d 699 (2004). Mr. Pierce asserts that the district court did not have subject-matter jurisdiction due to the Information being filed after the grand jury ignored the charge against him. As such, his claim is ripe for appellate review.

C. A Grand Jury Ignored The Charge Against Mr. Pierce

No document exists in the record unquestionably showing that a grand jury heard and ignored the charged against Mr. Pierce. Mr. Pierce recognizes that "[i]t is well established that an appellant bears the burden to provide an adequate record upon which the appellate court can review the merits of the claims of error, ...and where pertinent portions of the record are missing on appeal, they are presumed to support the actions of the trial court." *State v. Coma*, 133 Idaho 29, 34, 981 P.2d 754, 759 (Ct. App. 1999) (citation omitted). Thus, he anticipates the State may argue that he has not supported his claim that a grand jury ignored the charge against him. However, based upon the State's unequivocal statement made in the district court that a grand jury was shown pictures of the alleged victim and her sister, the fact that an Information was eventually filed after the original complaint had been dismissed, the fact that three grand jury proceedings occurred during the possible time-frame a grand jury would have heard his case for which nothing was submitted to the district court, and the fact that there is no criminal rule articulating a procedure when a grand jury ignores a charge, Mr. Pierce

asserts that the record in his case shows that a grand jury did in fact hear and ignore the charge.

1. The State Admitted That A Grand Jury Reviewed The Case

During the sentencing hearing, the prosecutor stated, "what was not included in [the presentence materials] that I saw in Ms. Armstrong's file are two photographs of the children in question. I would like to include those for purposes of the pre-sentence investigation. **These were shown to the grand jury as well.**" (Tr., 10/25/06, p.18, Ls.17-23 (emphasis added).) This statement is clear and unambiguous. There was no equivocal language such as "I believe" or "it is my understanding." The prosecutor acknowledged that a grand jury was convened.

The photos in question were not presented to the magistrate during the preliminary hearing. The only exhibit offered during the preliminary hearing was a written statement created by Mr. Pierce on the night of his arrest. (Exhibit: Tr., prelim, p.13, L.11 – p.15, L.15.) It strains reason to conclude that the prosecutor simply meant to say "to the magistrate" or "during the preliminary hearing" rather than "to the grand jury" when the two photos were, in fact, not presented during to the magistrate during the preliminary hearing. While the prosecutor making a simple mistake cannot be ruled out, to believe such is to believe that the prosecutor was both unaware that the hearing from which the charging document stemmed was secret and in front of sixteen citizens, outside the presence of the defendant, rather than open to the public, in front of one judge, in the presence of Mr. Pierce and his counsel, and that the prosecutor was merely mistaken in her belief that the photos were presented to whatever body was asked to determine if probable cause existed sufficient to formally charge the defendant.

Furthermore, the very relevance that the prosecutor offered to support her request to show the photos to the district court and to be included in the PSI materials, was that they were previously viewed by a probable cause finder. There is no reason to believe that the prosecutor would intentionally mislead the district court in order to convince the court to place the photos with the presentence materials. The most logical conclusion is that the prosecutor made the statements because, in fact, the photos were presented to the grand jury.

2. Three Grand Jury Proceedings May Have Occurred During The Approximate Time Frame That A Grand Jury Would Have Heard Mr. Pierce's Case And No Criminal Rule Directs A Grand Jury On What To Do When It Ignores A Charge

In response to an Order from this Court, the district court filed a written statement indicating the following:

> The staff of the clerk's office was unable to locate any records regarding grand jury proceedings involving the Defendant-Appellant nor any information that such proceedings took place. **The staff's search indicated that records of three grand jury proceedings (Nos. 22, 23 and 24), which may have taken place during the approximate time frame, were not received by the clerk's office.** The clerk's staff was unable to find any grand jury minutes, voting records, or other documents showing that a grand jury declined to issue an indictment against the Defendant-Appellant.

(*See* Response of the District Court Clerk to Order Re: Motion to Augment and to Suspend the Briefing Schedule Pending Grand Jury Determination, dated December 12, 2008) (emphasis added). The most obvious question is how could there have been grand jury proceedings in March of 2006, and the district court have no record of those proceedings in December of 2008? While the record in this case does

not reveal a definitive reason why,[5] the lack of a criminal rule stating exactly how such records are to be kept may provide an answer.

Idaho Criminal Rules 6.1 through 6.9 govern the procedures attendant to the grand jury process. Rule 6.4 enumerates the secrecy involved in grand jury proceedings. I.C.R. 6.4. The only people allowed to be present are the grand jurors, the prosecuting attorney, a witness present for questioning, the person designated to report the proceedings, and any needed interpreters. I.C.R. 6.4(a). The district court judge is only allowed to be present, after the grand jury has been empanelled, if requested by the grand jury. *Id.* These proceedings, while secret, are supposed to be recorded either stenographically or electronically. I.C.R. 6.3(a). The recordings of the proceedings are supposed to be sealed by the clerk of the court and are only available for review, by order of the district court, by the prosecutor, the defendant or his counsel, or a person charged with perjury stemming from his testimony in front of the grand jury. I.C.R. 6.3(b)-(c).

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[5] In Mr. Pierce's Motion To Augment And To Suspend The Briefing Schedule And For *In Camera* Review Of Grand Jury Proceedings And Statement And Affidavit In Support Thereof, filed January 16, 2009, undersigned counsel included his own affidavit acknowledging that he had spoken with two Ada County deputy clerks who informed him, respectively, that it was their understanding that any time a grand jury is empanelled and fails to indict, the prosecutor does not file any documentation indicating as such with the district court and destroys the audio recordings of the proceedings. If this is true, it is truly disturbing. Arguably a prosecutor who engages such behavior is withholding or destroying evidence that may be both exculpatory, mitigating and potentially impeaching. *See Brady v. Maryland*, 376 U.S. 83, 87 (1963). Furthermore, such behavior would enable a prosecutor to violate a defendant's Article I, § 8 rights in the hope that a defendant would never find out – a violation difficult to discover due to the secrecy of the grand jury proceedings in general. Such behavior would be frowned upon by the Idaho Rules of Professional Conduct and would be repugnant to the basic ideal at the very foundation of this Nation that a person may not have their life, liberty, or

When 12 grand jurors find probable cause sufficient to issue an indictment, the presiding grand juror must return the indictment to the district court. I.C.R. 6.6(c). Furthermore, the presiding grand jury is required to prepare a list of all jurors voting in favor of, and against, an indictment, a list that must be sealed but can be disclosed to the prosecutor, defendant and defense counsel, by order of the court. I.C.R. 6.6(d). This later rule appears to apply only when a grand jury has issued an indictment as, absent an indictment, there would likely be no defendant and no defense counsel. Furthermore, Rule 6.7(b) allows a defendant who has been indicted to challenge individual jurors provided that, if twelve or more qualified grand jurors concurred in finding an indictment, dismissal of the indictment is not warranted. I.C.R. 6.7(b). Thus, the voting list required under I.C.R. 6.6(d) appears to serve the purpose of a challenge under Rule 6.7(b).

In any event, there is no criminal rule that specifically states what a grand jury is to do when they "ignore" a charge. Idaho Code § 19-1402 states that if a grand jury fails to indict a defendant, "the depositions, if any, transmitted to them must be returned to the court, with an indorsement thereon, signed by the foreman, to the effect that the charge is dismissed." I.C. § 19-1402. While this requirement states what procedure should be used when a grand jury fails to indict, there is no criminal rule that gives effect to this statute. Without a criminal rule giving effect to § 19-1402, and without any other document informing the grand jury, and prosecutors, what to do when a grand jury ignores a charge, the absence of evidence documenting that the grand jury ignore the charge, is not evidence of absence.

In sum, the prosecutor stated that the grand jury reviewed Mr. Pierce's case. No grand jury Indictment was filed. Three grand jury proceedings may have occurred during the time period in which Mr. Pierce's case would have been pending, but there are no records as to what those grand jury proceedings dealt with. The absence of documentation showing that the grand jury ignored the charge is not dispositive of whether the grand jury heard the case based upon the secrecy of the grand jury proceedings, the role of gatekeeper employed by the prosecutor, and the lack of a criminal rule instructing the grand jury on what to do when it ignores a charge, Mr. Pierce asserts that the record in this case leads inextricably to the conclusion that a grand jury was empanelled, heard the allegations against him, and ignored the charge.

D. Because The Grand Jury Ignored The Charge Against Mr. Pierce, The District Court Had No Subject-Matter Jurisdiction To Hear His Case And His Conviction Must Be Vacated

Because a grand jury ignored the charge against him, the Information filed by the prosecutor was a legal nullity due to the clear and unequivocal requirements of Article I, § 8 of the Idaho Constitution, and the district court did not have subject-matter jurisdiction over Mr. Pierce's case. As such, this Court must vacate his conviction.

II.

The District Court Abused Its Discretion After Mr. Pierce Admitted To Violating His Probation By Executing His Original Sentence Under The Facts And Circumstances Of This Case

A. Introduction

Mr. Pierce asserts that, given any view of the facts, the district court abused its discretion by executing the original sentence upon Mr. Pierce admitting to violating the

terms of his probation. He asserts that his unified sentence of fifteen years, with five years fixed, is excessive considering the nature of his criminal act and his actions since that time. The district court abused its discretion by failing to continue Mr. Pierce on probation, failing to grant Mr. Pierce an opportunity at a second rider, or failing to reduce his sentence.

B. The District Court Abused Its Discretion After Mr. Pierce Admitted To Violating His Probation By Executing His Original Sentence Under The Facts And Circumstances Of This Case

In proceedings stemming from alleged probation violations, the district court must decide three issues: whether a condition of probation was violated; if so, whether probation should be revoked or continued; and, if probation is revoked, what prison sentence should be ordered. *State v. Adams*, 115 Idaho 1053, 1054, 772 P.2d 260, 261 (Ct. App. 1989). In the present case, Mr. Pierce does not challenge the finding that he violated the terms of his probation as he admitted that he had done so. When an appellate Court reviews a sentence ordered into execution after probation has been revoked, the Court reviews the entire record including events before and after the original judgment was entered. *Id.* at 1055, 772 P.2d at 262.

Where a defendant contends that the sentencing court executed an excessively harsh sentence, the appellate court will conduct an independent review of the record giving consideration to the nature of the offense, the character of the offender, and the protection of the public interest. *See State v. Reinke*, 103 Idaho 771, 653 P.2d 1183 (Ct. App. 1982). The Idaho Supreme Court has held that, "'[w]here a sentence is within statutory limits, an appellant has the burden of showing a clear abuse of discretion on the part of the court imposing the sentence.'" *State v. Jackson*, 130 Idaho 293, 294,

939 P.2d 1372, 1373 (1997) (quoting *State v. Cotton*, 100 Idaho 573, 577, 602 P.2d 71, 75 (1979)). In order to show an abuse of discretion, Mr. Pierce must show that in light of the governing criteria, the sentence was excessive considering any view of the facts. *Id.* (citing *State v. Broadhead*, 120 Idaho 141, 145, 814 P.2d 401, 405 (1991), *overruled on other grounds by State v. Brown*, 121 Idaho 385, 825 P.2d 482 (1992)). The governing criteria, or objectives of criminal punishment are: (1) protection of society; (2) deterrence of the individual and the public generally; (3) the possibility of rehabilitation; and (4) punishment or retribution for wrongdoing. *Id.* (quoting *State v. Wolfe*, 99 Idaho 382, 384, 582 P.2d 728, 730 (1978)).

The district court had four options available to it during the disposition hearing: the court could have retained Mr. Pierce on probation applying some form of alternate sanction; pursuant to Idaho Code § 19-2601(4), the court could have retained jurisdiction for a second time over Mr. Pierce; pursuant to Idaho Criminal Rule 35, the district court could have executed a reduced sentence; or, the court could have executed the original sentence. Viewing all of the facts and circumstances in this case, the district court abused its discretion by executing the original sentence and not exercising one of the three lesser alternatives.

Initially, it should be recognized that the nature of Mr. Pierce's offense, while certainly criminal and deserving of punishment, was not severe. Mr. Pierce was a neighbor of the four-year-old girl and her five-year-old sister and he admitted to pulling down the four year-old's underwear and looking at her genitals. (PSI, 9/14/06, p.2.) The four-year old told CARES personnel that no one has touched her "pee-pee" or her "butt." (PSI, 9/14/06: BPD Supplemental Report (Stephenson), 3/22/06). While

perhaps not mitigating, the evidence showing that Mr. Pierce did nothing more than look at the child's genitals shows that the nature of the crime was certainly not severe.

In exchange for nothing, Mr. Pierce agreed to plead guilty. (Tr., 8/1/06, p.1, L.1 – p.2, L.25.) The State's only assurance was that they would take into account the results of any psychosexual evaluation and the information contained in the PSI but they were not bound to make any recommendations.[6] (Tr., 8/1/06, p.1, L.1 – p.2, L.25.) The district court signed an order requiring Ada County to pay for Dr. John Morgan to conduct the psychosexual evaluation (R., pp.37-38); however, apparently based upon a proposed order submitted by the State (R., pp.42-43), the district court entered an Order Withdrawing Order for Evaluation by Dr. Morgan erroneously stating that the plea agreement required that an evaluation would be done by a SANE evaluator (R., pp.44-45.) Nevertheless, the State's chosen evaluator, Dr. Robert Engle, concluded that Mr. Pierce is a low risk to re-offend and is an appropriate candidate for outpatient sex offender treatment. (Psychosexual Eval, pp.9, 11.)

Mr. Pierce was 23 years old at the time of his original sentencing. (PSI, 9/14/06, p.1.) Mr. Pierce's biggest problem is his alcoholism. He started drinking around the age of 13 and as he got older he drank more and more. (PSI, 9/14/06, pp.13-14.) As early as age 16, Mr. Pierce was drinking every other day or so. (PSI, 9/14/06, p.13.) Mr. Pierce's father was also an alcoholic and on one occasion, Mr. Pierce heard his father choking his mother, he punched his father, and his father left. (PSI, 9/14/06, p.6.) The unintended consequence of his father leaving was that he then had the whole

[6] This appears to be a recitation of a prosecutor's responsibilities in any sentencing hearing.

house to himself and could party whenever he wanted. (PSI, 9/14/06, p.6.) By the time he went to jail pending resolution of the charges, he was using so much alcohol that he suffered serious withdrawal symptoms. (PSI, 9/14/06, p.14.) On the night of his crime, he drank "'a half bottle of Black Velvet Whiskey.'" (PSI, 9/14/06, p.14.) Mr. Pierce has also used methamphetamine and marijuana in the past. (PSI, 9/14/06, p.14.) Mr. Pierce's mother expressed her supporter for her son and noted that alcohol is his problem. (PSI, 9/14/06, pp.7-8.) Mr. Pierce recognized that he needed alcohol treatment and expressed a desire to partake in such treatment. (PSI, 9/14/06, p.14.)

Despite Dr. Engle's conclusions, during the sentencing hearing the State recommended that Mr. Pierce be sent to prison for a period of fifteen years, with two years fixed. (Tr., 10/25/06, p.20, L.22 – p.29, L.7.) Counsel for Mr. Pierce asked that he be placed on probation. (Tr., 10/25/06, p.39, Ls.14-17.) The district court imposed and executed a unified sentence of fifteen years, with five years fixed, but retained jurisdiction so that Mr. Pierce could participate in a rider. (R., pp.51-54.)

At the conclusion of his rider, the Department of Correction recommended that he be placed on probation. (APSI.) Mr. Pierce wrote a letter to the court indicated that his participation in the Sex Offender Assessment Group made him realize that his actions hurt M.B. and her family and he wished for a chance to make amends. (APSI: Letter from Mr. Pierce.) Despite the recommendations from the IDOC, the prosecutor recommended that the court relinquish jurisdiction because, in the prosecutor's mind, the DOC recommendation of probation was a "conclusion completely in error." (Tr., 4/5/07, p.56, Ls.19-22.) The district court ultimately placed Mr. Pierce on probation for a period of fourteen years. (R., pp.58-71.)

Mr. Pierce admitted to violating his probation by failing to pay his supervision fees, failing to complete sex offender treatment and by frequenting places where minors or victims of choice congregate. (Tr., 12/13/07, p.10, L.21 – p.11, L.20.) Notably, he had not engaged in any criminal activity, had not consumed any alcohol or controlled substances, and most importantly, he had not re-offended. (*See* PSI, 1/25/08, p.2; Attachment, Report of Probation Violation.) In fact, Mr. Pierce completed a polygraph examination where he was asked if he had any sexual contact other than with the two adult women he admitted to having contact with (including the mother of one of his children), Mr. Pierce stated that he had not and the examiner noted that his reactions were consistent with truthfulness. (PSI, 1/25/08 Attachment, Confidential Polygraph Report.)

During the disposition hearing, the State for the third time asked that Mr. Pierce be sent to prison. (Tr., 2/8/08, p.88, Ls.14-15.) Counsel for Mr. Pierce asked that he either be retained on probation or sent on a second rider. (Tr., 2/8/08, p.88, L.18 – p.91, L.2.) Counsel noted to the court that Mr. Pierce has the strong support of his family and that he because he took the Sex Offender Assessment Group while on his first rider, he did not take other programming that would address other areas of concern such as his thinking errors. (Tr., 2/8/08, p.88, L.18 – p.93, L.4.) The district court then revoked Mr. Pierce's probation and did not reduce his sentence. (R., pp.89-91.)

Mr. Pierce is currently serving a unified sentence of fifteen years, with five years fixed, after he admitted to pulling down a four-year old girl's underwear when he was drunk. Already a low risk to re-offend, between the time he made that poor decision and the time the district court executed his sentence, he had learned how his actions

had harmed the child and her family, had stopped drinking, and had not committed any new criminal offenses, specifically, he had not committed any new sex offenses. The Idaho Supreme Court has held that substance abuse should be considered as a mitigating factor by the district court when that court imposes sentence. *State v. Nice*, 103 Idaho 89, 645 P.2d 323 (1982). In *Nice*, the Idaho Supreme Court reduced a sentence based on Nice's lack of prior record and the fact that "the trial court did not give proper consideration of the defendant's alcoholic problem, the part it played in causing defendant to commit the crime and the suggested alternatives for treating the problem." *Id.* at 91, 645 P.2d at 325. Furthermore, the Idaho Supreme Court has ruled that ingestion of drugs and alcohol resulting in impaired capacity to appreciate criminality of conduct, could be a mitigating circumstance. *State v. Osborn*, 102 Idaho 405, 408, 631 P.2d 187, 190 (1981).

Additionally, Mr. Pierce has the strong support of his family members and friends. (PSI, p.6.) *See State v. Shideler*, 103 Idaho 593, 594-595, 651 P.2d 527, 528-29 (1982) (reducing sentence of defendant who had the support of his family and employer in his rehabilitation efforts). He was 23 year old at the time of this offense and Idaho Courts recognize that the young age of a defendant should be taken into consideration as a mitigating factor. *See State v. Dunnagan*, 101 Idaho 125, 126, 609 P.2d 657, 658 (1980).

Considering the nature of the offense and character of the offender, the district court abused its discretion by failing to continue probation, send Mr. Pierce on a second rider, or reduce his sentence.

CONCLUSION

Mr. Pierce respectfully requests that this Court vacate his conviction due to the district court's lack of subject-matter jurisdiction. Alternatively, he respectfully requests that this Court remand his case to the district court with instructions that he be placed on probation or that the district court retain jurisdiction or otherwise reduce Mr. Pierce's sentence as this Court deems appropriate.

DATED this 30th day of March, 2009.

JASON C. PINTLER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 30th day of March, 2009, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

LUIS JAMES PIERCE
INMATE # 83539
ISCI
PO BOX 14
BOISE ID 83707

MICHAEL E WETHERELL
DISTRICT COURT JUDGE
ADA COUNTY DISTRICT COURT
200 W FRONT STREET
BOISE ID 83702 7300

MEGAN GLINDEMAN
ADA COUNTY PUBLIC DEFENDERS OFFICE
200 W FRONT ST DEPARTMENT 17
BOISE ID 83702
STATEHOUSE MAIL

KENNETH K JORGENSEN
DEPUTY ATTORNEY GENERAL
CRIMINAL DIVISION
PO BOX 83720
BOISE ID 83720 0010
Hand deliver to Attorney General's mailbox at Supreme Court

HEATHER R. CRAWFORD
Administrative Assistant

JCP/hrc